

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SUSANNA C.,

Plaintiff,

v.

3:20-CV-0931  
(ML)

COMMISSIONER OF SOCIAL SECURITY  
ADMINISTRATION,

Defendant.

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APPEARANCES:

OF COUNSEL:

SUSANNA

*Pro se* Plaintiff

5847 Catskill Turnpike Road  
Delhi, New York 13753

SOCIAL SECURITY ADMINISTRATION

MICHAEL HENRY, ESQ.

Counsel for the Defendant

625 JFK Building  
15 New Sudbury Street  
Boston, Massachusetts 02203

MIROSLAV LOVRIC, United States Magistrate Judge

**ORDER**

Currently pending before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

argument was heard in connection with those motions on February 1, 2022, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination was supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by Plaintiff in this appeal.

After due deliberation, and based upon the Court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is

**ORDERED** as follows:

- 1) Plaintiff's motion for judgment on the pleadings (Dkt. No. 15) is DENIED.
- 2) Defendant's motion for judgment on the pleadings (Dkt. No. 16) is GRANTED.
- 3) The Commissioner's decision denying Plaintiff Social Security benefits is AFFIRMED.
- 4) Plaintiff's Complaint (Dkt. No. 1) is DISMISSED.
- 5) The Clerk of Court is respectfully directed to enter judgment, based upon this determination, DISMISSING Plaintiff's Complaint in its entirety and closing this case.

Dated: February 9, 2022  
Binghamton, New York



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Miroslav Lovric  
United States Magistrate Judge  
Northern District of New York

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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K.

vs. 3:20-CV-931  
COMMISSIONER OF SOCIAL SECURITY,  
Defendant.  
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Transcript of an Order  
Telephone conference  
February 1, 2022

The HONORABLE MIROSLAV LOVRIC Presiding.

A P P E A R A N C E S

For Plaintiff: K., Pro Se

For Defendant: MICHAEL HENRY, ESQ.

*Ruth I. Lynch, RPR, RMR, NYSRCR  
Official United States Court Reporter  
Binghamton, New York 13901*

1           THE COURT: So let me start by indicating  
2 first that plaintiff has commenced this proceeding  
3 pursuant to 42 U.S.C. Sections 405(g) and 1383(c)(3)  
4 to challenge the adverse determination by the  
5 Commissioner of Social Security finding that she was  
6 not disabled at the relevant times and therefore  
7 ineligible for the benefits that she sought.

8           By way of background, I state as follows:

9           Plaintiff was born in 1957. I'm not going  
10 to indicate the date, month, and day in order to  
11 protect the privacy of the plaintiff, but Plaintiff  
12 was born in 1957, and Plaintiff is currently  
13 approximately 64 years old. She was 48 years old at  
14 the alleged onset of her disability on May 15th of  
15 2006.

16           Plaintiff lives with her husband.

17           Plaintiff is approximately 5 feet 6 inches  
18 in height and weighs approximately 370 pounds.

19           Plaintiff has a four-year college degree and  
20 can communicate in English.

21           Plaintiff's past work experience was as a  
22 middle school science teacher.

23           Plaintiff suffers from the medically  
24 determinable impairments of morbid obesity;  
25 hypothyroidism with thyroid nodules; obstructive sleep

1 apnea and periodic limb movement disorder;  
2 hypertension; hyperlipidemia; hiatal hernia and  
3 resulting gastroesophageal reflux disorder; a history  
4 of allergic rhinitis; and reactive airway disorder,  
5 variously considered as asthma and chronic obstructive  
6 pulmonary disorder, also known as COPD.

7 Plaintiff is prescribed the following:

8 Albuterol for asthma; aspirin for blood  
9 clots; atorvastatin, or I should say atorvastatin for  
10 cholesterol; auto PAP and oxygen concentrator;  
11 benazepril for blood pressure; furosemide for edema;  
12 glipizide for blood sugar; isosorbide mononitrate for  
13 angina pain; Lantus injection 30 milligrams for  
14 control of blood glucose; lovothyroxine for thyroid;  
15 metoprolol succinate for heart rhythm issues; and  
16 Symbicort inhaler; and Warfarin to prevent blood  
17 clots.

18 Plaintiff's activities of daily living  
19 include maintaining approximately five properties, by  
20 reference transcript at page 551, and repairing  
21 people's houses, and I refer to transcript at 322.

22 Plaintiff applied -- Plaintiff applied for  
23 Title II benefits initially on November 10th, 2015,  
24 alleging a disability since May 15th of 2006, and then  
25 she amended her onset date to December 18, 2007,

1 consistent with the obtainment of age 50. The ALJ  
2 considered the full initial alleged period of  
3 disability.

4 In support of her claim for disability  
5 benefits, Plaintiff claims disability based on, inter  
6 alia, cardiac disorders, diabetes, obstructive sleep  
7 apnea, asthma, kidney disease, reactive airway  
8 disease, joint pain, anxiety, endometrial cancer, and,  
9 lastly, thyroid disease.

10 Administrative Law Judge Arthur Patane  
11 conducted a hearing on November 21st, 2017, to address  
12 Plaintiff's application for benefits.

13 ALJ Patane issued an unfavorable decision on  
14 January 25th of 2018.

15 The Social Security Administration Appeals  
16 Council denied Plaintiff's application for review on  
17 September 24th of 2018. Plaintiff appealed to the  
18 U.S. District Court for the Northern District of New  
19 York, where the parties stipulated to a remand on  
20 February 7th of 2019.

21 On August 22nd, 2019, the Appeals Council  
22 issued a remand order. See transcript at 674 to 675.

23 A second hearing was held on May 19, 2020.  
24 ALJ Patane issued a second unfavorable decision on  
25 June 1st of 2020. See transcript at 656 to 650 -- let

1 me try that again, transcript at 656 to 666.

2 ALJ Patane decision became the final  
3 determination because Plaintiff did not file  
4 exceptions to the decision, and the Appeals Council  
5 did not assume jurisdiction within 60 days, pursuant  
6 to 20 CFR Sections 404.984(d).

7 This action was commenced on August 14th of  
8 2020, and it is timely.

9 At the hearing on May 19th, 2020, and at the  
10 commencement of this action, Plaintiff was represented  
11 by Attorney Peter Gorton. Mr. Gorton filed a motion  
12 to be relieved as attorney, which was granted before  
13 the filing of Plaintiff's brief. Since the withdrawal  
14 of Mr. Gorton, Plaintiff has proceeded pro se and has  
15 filed a brief in this case.

16 In his decision, ALJ Patane applied the  
17 familiar five-step test for determining disability.

18 At step one he concluded that Plaintiff had  
19 not engaged in substantial gainful activity since  
20 May 15, 2006, through September 30th of 2009, which  
21 was the date on which Plaintiff was last insured.

22 At step 2 he concluded that Plaintiff  
23 suffers from severe impairments that impose more than  
24 minimal limitations on her ability to perform basic  
25 work activities, specifically morbid obesity;

1     hypothyroidism with thyroid nodules; obstructive sleep  
2     apnea and mild periodic limb movement disorder;  
3     hypertension; hyperlipidemia; hiatal hernia and  
4     resulting gastroesophageal reflux disorder; history of  
5     allergic rhinitis; and reactive airway disorder, again  
6     variously considered as asthma and COPD.

7             At step three the ALJ, at step three ALJ  
8     Patane concluded that Plaintiff's conditions do not  
9     meet or medically equal any of the listed  
10    presumptively disabling conditions set forth in the  
11    commissioner's regulations, focusing on Listing 3.0,  
12    which is general respiratory; 4.0, which is  
13    cardiovascular; and 9.0, which is endocrine system.

14            The ALJ next determined that Plaintiff  
15    retains the residual functional capacity, also known  
16    as RFC, to perform light work as defined in 20 CFR  
17    404.1567(b), except she could only occasionally climb  
18    ramps and stairs; could never climb ladders, ropes,  
19    or scaffolds; and needed to avoid concentrated  
20    exposure to respiratory irritants.

21            At step four the ALJ concluded that  
22    Plaintiff could perform her past relevant work as a  
23    middle school science teacher. The ALJ therefore did  
24    not proceed to step five.

25            Now, as you know, this Court's functional



1     role in this case is limited and extremely  
2     deferential. I must determine whether correct legal  
3     principles were applied and whether the determination  
4     is supported by substantial evidence, defined as such  
5     relevant evidence as a reasonable mind would find  
6     sufficient to support a conclusion. As the Second  
7     Circuit noted in *Brault V. Social Security*  
8     *Administration Commissioner*, that's 683 F.3d 443, 2012  
9     case, the standing is demanding, more so than the  
10    clearly erroneous standard. The Court noted in *Brault*  
11    that once there is a finding of fact, that fact can be  
12    rejected only if a reasonable fact finder would have  
13    to conclude otherwise.

14             Now, in this appeal Plaintiff raises several  
15    contentions and arguments. First, Plaintiff argues  
16    that she did not have any earnings after May 15, 2006,  
17    and she disputes that she worked under the table doing  
18    home repairs with her husband or that she owned five  
19    rental properties.

20             Second, plaintiff argues that the ALJ erred  
21    when considering whether she had severe impairments  
22    by, A, not stating that her sleep apnea was severe and  
23    included many periods of hypoxia; B, holding that the  
24    evidence of record was insufficient to define  
25    medically determinable mental impairments between the

1 alleged onset date and the date last insured; and, C,  
2 holding that the evidence and record was insufficient  
3 to find medically determinable impairments of  
4 knee/joint issues and edema of the lower extremities  
5 between the alleged onset date and the date last  
6 insured.

7 Third, Plaintiff argues that through the  
8 date last insured, her morbid obesity met or equaled  
9 the severity of one of the listed impairments in  
10 20 CFR part 404, subpart P, appendix 1.

11 Fourth, Plaintiff argues that the ALJ erred  
12 when he found that she had the RFC to perform light  
13 work, assigned the opinion of Dr. Dalton little  
14 weight, and considered the opinion of Stage agency  
15 psychological consultant, Dr. Bruno, who did not  
16 physically -- who did not physically assess her.

17 Fifth, Plaintiff argues that the ALJ erred  
18 when he found that she would be able to perform as  
19 either an elementary or secondary school teacher, as  
20 she does not have the mental or physical capacity to  
21 perform the position and thus was under a disability  
22 from May 15th, 2006, through the date last insured,  
23 September 30th of 2009.

24 The Court's analysis is as follows.

25 With respect to Plaintiff's first argument,

1 ALJ Patane found that Plaintiff did not engage in  
2 substantial gainful activity during the relevant time  
3 period, a finding that the parties do not contest on  
4 appeal. As a result, Plaintiff's reported activities  
5 of completing home repairs with her husband and  
6 maintaining rental properties during the relevant  
7 period was properly used, pursuant to 20 CFR  
8 Section 404.1529(c)(3)(i), as a relevant factor in  
9 evaluating her alleged symptoms and limitations, and  
10 Section 404.1571, work that is not substantial gainful  
11 activity may show that a claimant is able to do more  
12 work than he or she actually did.

13 In addition, as Defendant asserts, the Court  
14 is limited to the evidence in the administrative  
15 record that was before the agency, and thus  
16 Plaintiff's sworn statements in her brief are  
17 unavailing.

18 Second, the ALJ supportably determined that  
19 Plaintiff's sleep apnea was a severe impairment that  
20 significantly limited the ability to perform basic  
21 work activities as required by SSR 85-28.

22 The ALJ also supportably determined that the  
23 record evidence was insufficient to find medically  
24 determinable mental impairments between the alleged  
25 onset date and the date last insured. For example,

1 the ALJ noted that although Mr. Ketchel opined that  
2 Plaintiff had mental impairments that she had not yet  
3 overcome when she moved in 2003, he had not treated  
4 her in 13 years when he provided his opinion. There  
5 was no medical records to substantiate his diagnosis,  
6 and he did not provide any opinion regarding  
7 Plaintiff's functioning during the relevant time  
8 period. It is also noteworthy that Mr. Ketchel, as a  
9 social worker, was not qualified to diagnosis mental  
10 impairments under the regulations. See 20 CFR  
11 Section 404.1521 and 404.1502.

12 Further, the ALJ supportably determined that  
13 the record evidence was insufficient to find medically  
14 determinable impairments of knee/joint issues and  
15 edema of the lower extremities between the alleged  
16 onset date and the date last insured. For example,  
17 although 2007 to 2008 medical notes state that  
18 Plaintiff had lower extremity edema, the edema was  
19 described as trace, and Plaintiff reported feeling  
20 well and did not complain about the edema. In  
21 addition, during a December 2010 cardiology visit,  
22 Plaintiff exhibited no edema and reported that she was  
23 physically quite active.

24 Third, for the reasons stated in Defendant's  
25 brief, Plaintiff has not shown that she had a

1 musculoskeletal impairment that met or equalled a  
2 listing when considered in combination with her  
3 obesity. Plaintiff has not shown that the records  
4 attached to her brief, which are dated 2010 through  
5 2018, were not in existence or available to her at the  
6 time of the administrative hearing in 2020. In  
7 addition, Plaintiff failed to show that these records  
8 might have changed the outcome of the prior proceeding  
9 where the medical records from December 2010 reflected  
10 that Plaintiff was physically active and reported no  
11 physical symptoms, which is strong evidence that her  
12 impairments were not as limiting as she alleges.

13 Fourth, the RFC finding was supported by  
14 substantial evidence. The ALJ supportably assigned  
15 little weight to the opinion of Dr. Dalton, noting  
16 that the record was poorly supported by Dr. Dalton's  
17 opinion because primary care and endocrinology records  
18 referenced few physical complaints and mostly benign  
19 clinical findings with only conservative care and  
20 because when she presented with significant  
21 respiratory, sleep, energy, and pain complaints in mid  
22 2009, they appeared to have mostly resolved with quick  
23 implementation after CPAP therapy. See transcript at  
24 663.

25 The ALJ stated that Dr. Dalton's opinion was

1 contradicted by Plaintiff's own accounts from February  
2 2008 that she told her endocrinologist that she had  
3 come -- she had some fatigue and shortness of breath,  
4 particularly when climbing stairs. See transcript at  
5 663.

6 The ALJ also noted that in May 2018, upon  
7 return to her general practitioner, Plaintiff had no  
8 active complaints of chest pain or shortness of  
9 breath. See transcript at 6 -- at page 663. The ALJ  
10 stated that throughout the record Plaintiff informed  
11 her medical providers that she was performing work  
12 doing home repairs with her husband and maintaining  
13 properties. Thus the ALJ's assignment of little  
14 weight to Dr. Dalton's opinion is supported by  
15 substantial evidence.

16 Further, in assessing Plaintiff's RFC, an  
17 ALJ is entitled to rely on opinions from both  
18 examining and nonexamining state agency medical  
19 consultants because these consultants are qualified  
20 experts in the field of Social Security Disability.  
21 See 20 CFR Sections 4704.1512(b)(vi);  
22 Section 404.1513(c); Section 404.1527(e). See also  
23 case Frey ex rel. A.O. versus Astrue at 485 Fed  
24 Appendix 484 at page 487, a Second Circuit 2012 case.  
25 And in there the report of a state agency medical

1 consultant constitutes expert opinion evidence which  
2 can be given weight if supported by medical evidence  
3 in the record.

4 See also the case of Little versus Colvin,  
5 that's 14-CV-63, that's found at 2015 West Law  
6 1399586 at page 9, and that's a Northern District of  
7 New York March 26, 2015, case. And it stands for the  
8 proposition that state agency physicians are qualified  
9 as experts in the evaluation of medical issues in  
10 disability claims. As such, their opinions may  
11 constitute substantial evidence if they are consistent  
12 with the record as a whole. Therefore, the ALJ was  
13 allowed to consider and rely on Dr. Bruno's opinion.

14 Fifth, under 20 CFR Section 404.1529(a), an  
15 ALJ cannot rely on Plaintiff's statements alone, and  
16 the ALJ must weigh them against all of the other  
17 evidence. Here, the ALJ properly weighed all the  
18 evidence and accepted functional limitations that  
19 record -- that the record credibly supports. The ALJ  
20 was not required to assume additional limitations when  
21 evaluating Plaintiff's ability to do her past work or  
22 other jobs in the national economy.

23 So based on this record and based on  
24 everything before this Court, I find that as a result  
25 Plaintiff's motion for judgment on the pleadings is

1 denied. The defendant's motion for judgment on the  
2 pleadings is granted. Plaintiff's complaint is  
3 dismissed, and the Commissioner's decision denying  
4 Plaintiff benefits is hereby affirmed.

5 That constitutes the Court's order.

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